Filed 8/30/16 P. v. Hendrix CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. CURTIS HENDRIX, Defendant and Appellant.	F071638 (Fresno Super. Ct. No. F0566549-2) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. Denise Lee Whitehead, Judge.

Benjamin Ramos, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Kevin L. Quade, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Gomes, Acting P.J., Detjen, J. and Franson, J.

Appellant Curtis Hendrix appeals the denial of his application to reduce his prior conviction for possession of cocaine base for sale (Health & Saf. Code, § 11351.5)[1] to a misdemeanor under Proposition 47. Appellant contends the denial of his application violates principles of equal protection. For the reasons set forth below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On February 27, 1997, appellant pled to the charge of violating section 11351.5. He was initially granted probation, but upon a violation was sentenced to four years in prison.

Following the enactment of Proposition 47, appellant applied to have his completed sentence reduced to a misdemeanor, alleging he had been convicted under section 11350. The court denied appellant's request, finding appellant was not eligible for relief because his conviction did not qualify for relief under Penal Code section 1170.18.

This timely appeal followed.

DISCUSSION

Appellant contends that the failure to consider him eligible for resentencing violates equal protection principles because he was convicted of a nonserious, nonviolent felony.

Standard of Review and Applicable Law

"The concept of equal treatment under the laws means that persons similarly situated regarding the legitimate purpose of the law should receive like treatment. [Citation.] ' "The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly* situated groups in an unequal manner." [Citations.] This initial inquiry is not whether persons are similarly situated for all purposes, but "whether they are similarly

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[1] All statutory references are to the Health and Safety Code unless otherwise noted.

situated for purposes of the law challenged." ' " (*People v. Morales* (2016) 63 Cal.4th 399, 408 (*Morales*).)

If this showing is met, a further analysis is undertaken. " 'The concept [of equal protection] recognizes that persons similarly situated with respect to the legitimate purpose of the law receive like treatment, but it does not ... require absolute equality. [Citations.] Accordingly, a state may provide for differences as long as the result does not amount to invidious discrimination.' " (*People v. Cruz* (2012) 207 Cal.App.4th 664, 675.) " 'In resolving equal protection issues, the United States Supreme Court has used three levels of analysis. Distinctions in statutes that involve suspect classifications or touch upon fundamental interests are subject to strict scrutiny, and can be sustained only if they are necessary to achieve a compelling state interest. Classifications based on gender are subject to an intermediate level of review. But most legislation is tested only to determine if the challenged classification bears a rational relationship to a legitimate state purpose.' " (*Ibid.*)

The determination of a statute's constitutionality is a question of law and is thus considered de novo. (*People v. Health Labs. of North America* (2001) 87 Cal.App.4th 442, 445.)

Appellant Cannot Show an Equal Protection Violation

Appellant argues that equal protection principles were violated because he was not disqualified for retroactive sentencing relief, but was deemed ineligible because Proposition 47 did not list his conviction as a crime subject to retroactive sentencing relief. We do not agree.

There is no equal protection violation simply because appellant was excluded from the changes enacted through Proposition 47. Our Supreme Court has noted why there is no equal protection obligation to either modify existing sentences or make revised sentencing provisions retroactive in the context of Proposition 47. "Persons resentenced under Proposition 47 were serving a proper sentence for a crime society had deemed a

felony (or a wobbler) when they committed it. Proposition 47 did not have to change that sentence at all. Sentencing changes ameliorating punishment need not be given retroactive effect. ' "The Legislature properly may specify that such statutes are prospective only, to assure that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written." ' " (*Morales*, *supra*, 63 Cal.4th at p. 408.) The fact that the electorate chooses to modify certain sentences and permit those convictions to be retroactively reduced, but not others, does not show an equal protection violation because the electorate's legitimate choice regarding which convictions to modify differentiates the groups. (See *People v. Floyd* (2003) 31 Cal.4th 179, 191 [" '[T]he 14th Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time.' "].) This is particularly true here, where appellant was convicted and completed his sentence prior to when Proposition 47 was enacted. Appellant does not contest that at the time he was sentenced, his sentence was proper. That the electorate later decided to retroactively reclassify sentences for similar crimes, but not for those convicted under section 11351.5, does not rise to the level of an equal protection violation.

DISPOSITION

The judgment is affirmed.